HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

ANOTHER VIRGINIA COUPON CASE. — The case of *McCullough* v. *Virginia*, 19 Sup. Ct. Rep. 134, decided last month by the Supreme Court of the United States, is an addition to the law touching the length to which the court may go in reviewing the decision of a State court when there is a question of impairment of contract. It is the last of that large family of cases given birth to by the Virginia coupon legislation of 1871, at the time of the refunding of the debt of that State. New bonds were issued, the State contracting that the coupons annexed should be receivable for all taxes. For twenty-seven years this legislation has been upheld, except as to one sort of tax, which under the Constitution of Virginia was payable only in specie. But during all that time the legislature has done its best to impair the State's agreement. A statute was passed in 1887 providing that only gold, silver, United States treasury notes, and national bank notes, were receivable for taxes; and by virtue of this statute the present plaintiff was refused relief when he took the proper steps to obtain credit, in payment of taxes, for the coupons which he held. The highest court of the State held the entire coupon agreement unconstitutional, the whole vitiated by the part which was formerly held invalid. It was urged that the Supreme Court could not review this decision; but the court has taken the other view, reversed the judgment of the Virginia court, held the funding contract valid, and decided that it is impaired by the later statute.

The decision is noteworthy by reason of the subtlety of the argument which it discountenances. That argument, embodied in the dissenting opinion of Mr. Justice Peckham, insisted, soundly enough, that the court could not review a decision which did not give effect to the statute which was thought to impair the contract. But no statute, he said, was given effect to by the Virginia decision; the contract in regard to coupons was held void, and the law was left as it was before, regardless of statute; coupons were simply held not receivable for taxes, and the judgment made no mention of the later statute. Strange to say, the facts of previous cases give countenance to the idea that the literal decision cannot be looked beyond. The court has always claimed the right, it is true, to

review the decision below as to the existence or scope of a contract whenever one is claimed to have been impaired; but it has seldom asserted this right except when the decision below did in terms give effect to a statute. See *New Jersey* v. *Wilson*, 7 Cranch, 164; *Bridge Prop'rs* v. *Hoboken County*, 1 Wall. 46. If Mr. Justice Peckham's reasoning is sound, a broad field is opened for evasions of the constitutional provision. But the reasoning is too stilted. The court has a right to look at the whole record and at all the circumstances. It appeared that throughout the principal case the bone of contention had been the validity of the later statute, and the court could not overlook the glaring fact that the State court did give effect to that statute, although it did not say so. This view is properly a broad one, consistent with the subject with which it deals.

WAYS OF NECESSITY — WHAT ARE THEY? — It is a common impression that a way of necessity may be demanded wherever a landowner finds that he has no access to his property except over the lands of others. That this impression is mistaken is shown by the case of *Ellis* v. *Blue Mountain Ass'n*, 41 Atl. Rep. 856, decided by the Supreme Court of New Hampshire. There the plaintiff owned a farm situated in the centre of Corbin Park — a game preserve. A public highway running completely through the park was the sole means of access to the farm. The owner of the park prevailed on the town officials to exercise their statutory authority and abolish this highway; whereupon the plaintiff filed a bill to have a way of necessity laid out and to have the park owner enjoined from allowing his wild animals to trespass on the plaintiff's land. The injunction was granted, but the way was refused. The result is peculiar. The farm is carefully protected for the plaintiff's advantage, but he is unable legally to set foot on it. The court place the decision on the ground that while necessity may serve as a basis for an implied grant or reservation, yet where, as here, there can be no question of grant or reservation necessity in itself cannot entitle to a way. In contradiction of this reasoning, the early English cases laid emphasis on the bad policy of tying up lands, and granted ways on the ground "that the public good required that the land should not be unoccupied." *Dutton* v. *Taylor*, 2 Lutw. 1487. Later this reasoning was doubted by Lord Kenyon in *Hawton* v. *Frearson*, 8 T. R. 50; and in *Bullard* v. *Harrison*, 4 Maule & S. 317, Lord Ellenborough held that, where no grant could be implied and where no prescription could be alleged, no degree of necessity could create an easement. The English law is settled in accordance with this case. In America the courts almost without exception have taken the same view. *Tracy* v. *Atherton*, 35 Vt. 52.

As a matter of principle, the accepted doctrine seems correct. It is harsh dealing to allow one person to impose such a burden upon an utter stranger for private advantage, and without compensation. It is hard to find a principle that will justly determine which of several surrounding landowners, all free from fault, must give gratis to the owner inside. The cases of grants implied from necessity can give no support to the contention against the principal case; for in these cases the way is not given because of the necessity in itself, but because the necessity has come to be considered proof that a way was intended to pass as incident to the